

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

38

TRANSCRIPT OF RECORD

536

United States Court of Appeals for the
District of Columbia

APRIL TERM, 1939.

No. 7509

LIBRARY

J. E. DYER & COMPANY, PETITIONER,

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK

vs.

DISTRICT OF COLUMBIA.

PETITION FOR REVIEW OF DECISION OF THE BOARD OF TAX APPEALS
FOR THE DISTRICT OF COLUMBIA.

FILED AUGUST 29, 1939

PRINTED OCTOBER 24, 1939

United States Court of Appeals for the District of Columbia

APRIL TERM, 1939.

No. 7509

J. E. DYER & COMPANY, PETITIONER,

vs.

DISTRICT OF COLUMBIA, RESPONDENT

PETITION FOR REVIEW OF DECISION OF THE BOARD OF TAX APPEALS
FOR THE DISTRICT OF COLUMBIA.

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United States Court of Appeals for the District of Columbia

1

Board of Tax Appeals
For the District of Columbia

Docket No. 203.

DYER, J. E. & COMPANY, *Petitioner*,

vs.

DISTRICT OF COLUMBIA, *Respondent*.

Address: Francis J. Kelly, Esq.,
Munsey Building

Docket

Date	Memorandum
1939	
May 24	Petition filed, taxpayer notified, A. A. served Business Privilege
June 1	Entry of Appearance
June 14	Issue joined. Calendared - Hearing June 29
6/22/	Amended petition filed
6/29/	Hearing
7/1/	Stipulation
7/19/	Brief filed by petitioner
8/1/	Memorandum opinion and decision rendered
8/17/	Petition for Review filed by petitioner & Notice of Filing.

Endorsed: Received and Filed Jun 22 1939
Board of Tax Appeals for the District of Columbia.

Board of Tax Appeals
For the District of Columbia

Docket No. 203

J. E. DYER & COMPANY, 3330 M Street, N. W., Washington,
D. C., *Petitioner*,

vs.

DISTRICT OF COLUMBIA, *Respondent*.

Amended Petition

The above named petitioner petitions for a cancellation (or reduction) of an assessment of taxes against him and alleges as follows:

1. The petitioner is J. E. Dyer & Company, a corporation, with residence (or principal office at 3330 M Street, N.W., Washington, D. C.).

2. The tax in controversy is a business privilege tax for the fiscal year ending June 30, 1939, and in the amount of \$29.22.

3. The notice of assessment was dated May 11, 1939, and the tax was paid by the petitioner under protest in writing on May 22, 1939, as will appear in the copy of the notice of assessment attached to the original petition as Exhibit "A".

4. The facts upon which the petitioner relies as the basis of this proceeding are as follows: The amount of fifteen Hundred Five Dollars and fifty two cents (\$1,505.52) deducted as the first half of personal property tax is not correct, as as amended Bill has been rendered by the Assessor's Office which shows an increase of One Hundred Ninety Six Dollars and ninety-one cents (\$196.91). We claim that the amount of the amended personal tax Bill should be allowed as a deduction and claim that a refund should be made for the difference between the Bill paid herewith under protest and the corrected Bill with the first half of the reassessed personal tax Bill deducted.

Wherefore, the petitioner prays that this Board may hear the proceeding, and direct the refund as claimed above.

(s) FRANCIS J. KELLY
Attorney for J. E. Dyer & Company
Munsey Building
Washington, D. C.

DISTRICT OF COLUMBIA, ss:

R. F. Dyer, being duly sworn, says that he is the petitioner; that he has read the foregoing amended petition or has the same read to him and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and these he believes to be true.

J. E. DYER & COMPANY
By R. F. DYER (s)
Treas.

(Seal)

Subscribed and sworn to before me this 22nd day of June 1939.

Signed THOMAS J. FLYNN (s)
Notary Public, D. C.

4 Opinion No. 143

Endorsed: Received and Filed Aug. 1, 1939. Board of Tax Appeals for the District of Columbia.

Before the Board of Tax Appeals for the
District of Columbia

Docket No. 203.

J. E. DYER & COMPANY, *Petitioner*

VS.

DISTRICT OF COLUMBIA, *Respondent*

Memorandum Opinion.

This proceeding involves the propriety of the Assessor's refusal to allow as a credit against a business privilege tax the amount paid as a tangible personal property tax for the same fiscal year, namely, the fiscal year ending June 30, 1939.

The facts herein are substantially the same as those in *Smoot Sand & Gravel Corporation v. District of Columbia*, D. C. B. T. A., Docket No. 146, and the consideration of the question of law here present is controlled by the opinion of the Board in that proceeding to the effect that where the tangible tax was not paid within the time prescribed by law, namely, one-half in September and the other half in March of the fiscal year, the Assessor's refusal to allow such tax as credit against the business privilege tax was justified. For that reason it must be held that no part of the business privilege tax was erroneously collected, and that the petitioner is not entitled to any refund on account thereof.

Decision will be entered for the respondent.

JO. V. MORGAN,
Member Sole.

August 1, 1939.

5 Endorsed: Received and filed Aug. 1, 1939. Board
of Tax Appeals for the District of Columbia.

Before the Board of Tax Appeals for the
District of Columbia

Docket No. 203.

J. E. DYER & COMPANY, *Petitioner*

vs.

DISTRICT OF COLUMBIA, *Respondent*

Decision

This proceeding came on to be heard upon the petition filed herein, and upon consideration thereof and of the evidence adduced at the hearing on said petition, it is by the Board this 1st day of August, 1939,

Adjudged and Determined, That no sum as a business privilege tax or penalty thereon for the fiscal year ending June 30, 1939, has been erroneously collected by the District of Columbia from the petitioner, and that the petitioner is not entitled to any refund thereof.

JO. V. MORGAN,
Member Sole.

6 Received and Filed Aug 17 1939 Board of Tax Appeals for the District of Columbia

Board of Tax Appeals for the District of Columbia

Docket No. 203

J. E. DYER & COMPANY, 3330 M Street, N. W., Washington,
D. C., *Petitioner*,

vs.

DISTRICT OF COLUMBIA, *Respondent*.

Petition of J. E. Dyer & Company for Review by the United States Court of Appeals for the District of Columbia of a Decision by the Board of Tax Appeals for the District of Columbia.

J. E. Dyer & Company, the petitioner in this cause, by Francis J. Kelly, counsel, hereby files his petition for a review by the United States Court of Appeals for the District of Columbia of the decision of the Board of Tax Appeals for the District of Columbia rendered August 1, 1939 determining that the refusal to allow the payment of a personal property tax as credit against the business privilege tax was correct and that no part of the business privilege tax was erroneously collected because of the refusal to allow the payment of the personal property tax as a credit against the business privilege tax.

I.

The petitioner is a corporation with its principal office in Washington, District of Columbia.

II.

Nature of Controversy

(a) The controversy involves the question of the allowance of a credit for payment of personal property tax against the business privilege tax.

(b) The petitioner operates a wholesale grocery business at 3330 M Street, N. W., Washington, D. C.

7 (c) Petitioner paid his first-half personal property tax for the year 1938-39 in September, 1938. This amount in the sum of Fifteen Hundred Five

Dollars and fifty-two cents (\$1,505.52) was allowed as a credit against petitioner's business privilege tax which latter tax was paid on May 22, 1939. Subsequently, on June 8, 1939, the Assessor rendered an additional Tangible Personal Property Tax bill against petitioner in the sum of \$29.22 which petitioner paid on August 11, 1939. The facts upon which the increase was made are (1) petitioner reported average stock in trade in the amount of One Hundred Sixty-nine Thousand Eight Hundred Fifty-eight Dollars (\$169,858.) which was increased by the Assessor in the amount of Five Hundred Ten Dollars (\$510.) and (2) petitioner valued his furniture and fixtures at Two Thousand Two Hundred and Two Dollars (\$2,202.) which the Assessor increased by Eleven Hundred Fifty-eight Dollars (\$1,158.). The two increases amounted to Sixteen Hundred Sixty-eight Dollars (\$1,668.) and petitioner paid the additional tangible personal property tax on this sum in the amount of Twenty-nine Dollars and twenty-two cents (\$29.22.). Petitioner now claims that the amount of Twenty-nine Dollars and twenty-two cents (\$29.22) should be allowed as an additional credit against his business privilege tax claiming that the sum of Twenty-nine Dollars and twenty-two cents (\$29.22) was paid "within the time prescribed by law."

III.

The petitioner being aggrieved by the conclusion of law contained in said opinion of the Board of Tax Appeals, and by its decision entered in pursuance thereto desires to obtain a review thereof by the United States Court of Appeals for the District of Columbia.

IV.

Assignments of Error

The petitioner assigns as error the following acts and omissions of the Board of Tax Appeals:

- 8 (1) The deduction for the additional tangible personal property tax assessed and paid subsequent to April, 1939 was not allowed against the business privilege tax for the same fiscal year.

V.

Designation of Record

The Clerk of the Board of Tax Appeals is requested to prepare, certify and transmit to the Clerk of the United States Court of Appeals for the District of Columbia, with reference to this petition a transcript of the record in the above entitled cause, prepared and transmitted as required by law and by the rules of said Court, and to include in said transcript of record the following documents or certified copies thereof, to wit:

(1) The docket entries of all proceedings before the Board of Tax Appeals.

(2) Pleadings before the Board.

(3) Memorandum of Opinion of the Board of Tax Appeals.

(4) The decision of the Board of Tax Appeals.

(5) The Petition for Review, filed by the petitioner.

(6) Notice of Filing Petition for Review.

(8) Findings of fact and opinion of the Board of Tax Appeals in the case of Smoot Sand & Gravel Company vs. District of Columbia, District of Columbia, Board of Tax Appeals, Docket Number 146.

FRANCIS J. KELLY

Counsel for Petitioner

Munsey Building

Washington, D. C.

DISTRICT OF COLUMBIA, ss:

Francis J. Kelly being duly sworn, says that he is counsel of record in the above cause; that as such counsel he is authorized to verify the foregoing petition for review; that he has read the said petition and is familiar with the statements contained therein; and that the statements made are true to the best of his knowledge, information and belief.

FRANCIS J KELLY

9 Subscribed and sworn to before me this 16th day
of August, 1939.

THOMAS J FLYNN

(Seal)

Notary Public, D. C.

10 Board of Tax Appeals for the District of Columbia

Docket No. 203

J. E. DYER & COMPANY, 3330 M Street, N. W., Washington,
D. C., *Petitioner,*

VS.

DISTRICT OF COLUMBIA, *Respondent.*

Notice of Filing Petition for Review

ELWOOD H. SEAL, ESQUIRE

Corporation Counsel of the District of Columbia

District Building

Washington, D. C.

Counsel for the Respondent

Please take notice that the petitioner on August 17, 1939 filed with the Clerk of Board of Tax Appeals for the District of Columbia, a petition for review by the United States Court of Appeals for the District of Columbia of the decision of the Board heretofore rendered in the above cause. A copy of the petition for review, which includes the assignments of error and the designation of record, as filed, is hereto attached and served upon you.

Dated this 17th day of August, 1939

FRANCIS J KELLY

Counsel for Petitioner,

Munsey Building,

Washington, D. C.

Service of the foregoing notice, together with a copy of the petition for review is hereby acknowledged this 17th day of August, 1939.

ELWOOD H. SEAL (G. S.)

Corporation Counsel for the

District of Columbia,

Counsel for the Respondent.

11 Opinion No. 116

Board of Tax Appeals for the District of Columbia

Docket No. 146

THE SMOOT SAND & GRAVEL CORPORATION, *Petitioner*,

vs.

DISTRICT OF COLUMBIA, *Respondent*.*Findings of Fact and Opinion*

The Assessor of the District of Columbia assessed the petitioner and the petitioner paid the District of Columbia the sum of \$2,100.50 as a business privilege tax for the fiscal year ending June 30, 1939, less credit for tangible personal property taxes paid for the same fiscal year in the sum of \$1,182.24, or a net business privilege tax for such fiscal year in the sum of \$918.26. The petitioner claims that the net tax should be further reduced by a credit of \$380.45 representing a tangible personal property tax for the fiscal year ending June 30, 1938, paid, however, within the fiscal year ending June 30, 1939, that is to say, on July 26, 1938. The petitioner contends that it was entitled to the credit of \$380.45 because such tax was paid "within the time prescribed by law for the payment of such tax by the taxpayer."

Findings of Fact

The petitioner is a Delaware corporation with its principal office and place of business in the District of Columbia. It is engaged in the business of the sale of sand and gravel. During the calendar year ending June 30, 1937, the petitioner sold sand and gravel in the amount of \$527,125.05. Within the time prescribed by Title VI of the District of Columbia Revenue Act of 1937, as amended, the petitioner filed its return of gross receipts showing sales as above stated. On November 2, 1938, the Assessor assessed the petitioner a tax of four-tenths of one per centum of such gross receipts, less an exemption of \$2,000, or a total business privilege tax of \$2,100.50, less the credit for tangible personal property tax paid for the fiscal year ending June 30, 1939, in the sum of \$1,182.40, or a net business privilege tax of \$918.26.

In July, 1937, the petitioner filed with the Assessor of the District of Columbia its return of personal property for the purposes of taxation in which return showed the amount of personal property owned by it on that date in the amount of \$50,500. Thereafter the sum of \$883.75 as a tax upon such taxable personal property was assessed against the petitioner and was credited against the business privilege tax for the fiscal year ending June 30, 1938.

In its return of personal property as of July 1, 1937, the petitioner failed to include in its return personal property owned by it as of July 1, 1937, in the amount of \$21,740. Upon an audit of the books of the petitioner the Assessor discovered that the petitioner had failed to include within its report of tangible personal property as owned by it here in the District of Columbia on July 1, 1937, certain tangible personal property of the value of \$21,740. Upon the discovery of such omission, to wit, on July 22, 1938, the Assessor assessed the petitioner an additional sum as a tangible personal property tax in the amount of \$380.45. On July 26, 1938, the petitioner paid such additional assessment, together with a penalty of 1 per centum per month thereon for the months of April, May, June, and July, 1938.

Upon the receipt of the statement of the business privilege tax for the fiscal year ending June 30, 1939, assessed on November 2, 1938, as above stated, the petitioner claimed that the sum of \$380.45, paid on July 26, 1938, as an additional assessment of tangible personal property tax for the fiscal year ending June 30, 1938, should be credited against the business privilege tax for the fiscal year ending June 30, 1939, since the additional tangible personal property tax was actually paid within the fiscal year ending June 30, 1939. The Assessor refused to allow the credit of the additional personal property tax in the sum of \$380.45, and allowed to the petitioner as a credit against the business privilege tax for the fiscal year ending June 30, 1939, the tangible personal property tax for that fiscal year only.

13 The petitioner on November 7, 1938, paid one-half of the net business privilege tax in the sum of \$459.13, under protest in writing and, in like manner on December 7, 1938, paid the remaining half of the net business privilege tax. This proceeding was filed on January 20, 1939.

Opinion

The question here presented for solution is whether a tangible personal tax assessed against the petitioner on July 22, 1938, for the fiscal year ending June 30, 1938, and paid on July 26, 1938, should have been allowed as a credit against a business privilege tax assessed against the petitioner for the fiscal year ending June 30, 1939.

Section 7 (b) of Title VI of the District of Columbia Revenue Act of 1937, as amended by Public Resolution No. 104, 75th Congress, provides that:

“(b) Any tax on tangible personal property (other than motor vehicle) levied against and paid by the taxpayer to the District, within the time prescribed by law for the payment of such tax by the taxpayer, shall be allowed as a credit against the tax imposed by this title for the taxable year in which such tax on tangible personal property is paid.”

It will be observed that in order to be employed as a credit, the tangible personal property tax must be paid “within the time prescribed by law for the payment of such tax.” The solution of the problem here presented will depend upon the answer to the question: Was the tangible personal property tax, for which credit is claimed,
14 paid within the time prescribed by law? It it was the petitioner must prevail. If it was not so paid, the respondent must succeed.

The petitioner argues that since the assessment was not made until July 22, 1938, the payment thereof on July 26, 1938, was within a reasonable time and within the time prescribed by law. Certainly, it is contended by the petitioner, it was not required by law to pay the tax before the date of assessment. Authorities are cited in support of such contention. In a sense the petitioner is correct. *Tumulty et al v. District of Columbia*, 67 W. L. R. 142. The Board, however, does not believe that agreement with the claim of the petitioner would carry out the intention of Congress in enacting Public Resolution 104.

Section 758 of Title 20 of the Code of Laws of the District of Columbia (1929) imposes the tangible personal property tax here involved. It reads:

“Real-estate taxes and personal taxes of all kinds, excepting the tax on motor vehicles as herein provided, shall

hereafter be payable semiannually in equal installments in the months of September and March. If either of said installments on real or personal property shall not be paid within the months when the same is due, said installments shall thereupon be in arrears and delinquent, and there shall be added and collected with said tax a penalty of 1 per centum per month upon the amount thereof for the period of such delinquency, and such installment or installments, with the penalties thereon, shall constitute a delinquent tax to be collected in the manner provided by law."

The tangible personal property tax for which credit is claimed by the petitioner was for the fiscal year ending June 30, 1938. The petitioner was required by law to file a return during the month of July of that fiscal year (July, 1937) and report all tangible personal property owned by it as of July 1, 1937. (Section 757 of Title 20, D. C. Code, 1929). This the petitioner did not do. It failed to include

15 in its return tangible personal property in the amount of \$21,740. If it had followed the requirement of the law the Assessor would have assessed the tax against it, in respect of such omitted property, and one-half thereof would have been payable in September, 1937, and one-half in March, 1938. Through no fault of the respondent or any of its agents, but solely through the fault or omission of the petitioner, the tax was not assessed in the fiscal year ending June 30, 1938.

In the opinion of the Board the words "within the time prescribed by law" found in Section 7(b), as amended by Public Resolution 104, 75th Congress, means within the time within which the petitioner should have paid the tax if he had followed the law, not only with respect to payment but with respect to the proper reporting of personal property also.

The manifest purpose of Section 7(b), as amended by Public Resolution 104, 75th Congress, is to encourage or force the prompt payment of personal property taxes. Such purpose would be defeated if the contention of the petitioner should prevail.

It is clear, moreover, that Congress intended that the business privilege tax and the tangible personal property tax should be contemporary, and that those who are assessed and compelled to pay a tangible personal property

tax during one fiscal year, mostly merchants carrying stock in trade, etc., could employ such tax as a credit against the business privilege tax for the same fiscal year.

Finally, it should be observed that, if the contention of the respondent that the personal property tax to be used as a credit must be assessed in the same year as the business privilege tax and paid when due is not correct, there is, at least, such a doubt as to the meaning of Section 7(b), as amended, as would bring into operation the rule that he who claims a credit or exemption must support such claim

16 by clear and positive language in the granting statute, and that doubt as to its meaning must be resolved in favor of the taxing authority. *Burnet v. Houston*, 283 U. S. 223, 227; *Woolford Realty Co. v. Rose*, 286 U. S. 319, 326; *Brown v. Helvering*, 291 U. S. 193, 199, 205; *Ilfeld Co. v. Hernandez*, 292 U. S. 62, 66; *New Colonial Co. v. Helvering*, 292 U. S. 435, 440; *Helvering v. Inter-Mountain Life Insurance Co.*, 294 U. S. 686, 689, 690.

For the reasons stated it must be held that the assessment of the business privilege tax for the fiscal year ending June 30, 1939, without the allowance of credit for a tangible personal property tax assessed for the fiscal year ending June 30, 1938, but actually assessed and paid in the succeeding fiscal year, was proper; and that the petitioner is not entitled to any refund on account of either of such taxes.

Decision will be entered for the respondent.

JO. V. MORGAN

Member Sole

April 24, 1939.

17 Board of Tax Appeals for the District of Columbia

Docket No. 203

J. E. DYER & COMPANY, *Petitioner*

vs.

DISTRICT OF COLUMBIA, *Respondent*

Certificate

I, Phyllis Ragusa, Clerk of the Board of Tax Appeals for the District of Columbia, do hereby certify that the foregoing pages 1 to 17, inclusive, contain and are a true copy

of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Designation of Record in the Petition for Review in the appeal as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the Board of Tax Appeals for the District of Columbia, this 22nd day of August.

PHYLLIS A. RAGUSA

*Clerk, Board of Tax Appeals
for the District of Columbia*

(Seal)

Endorsed on cover: No. 7509 J. E. Dyer & Co., Petitioner, v. District of Columbia. United States Court of Appeals for the District of Columbia Filed Aug 29, 1939 Joseph W. Stewart, Clerk.

Addition to Record by Stipulation of Counsel

**United States Court of Appeals for the
District of Columbia**

OCTOBER TERM, 1939.

No. 7509

J. E. DYER & COMPANY, PETITIONER,

vs.

DISTRICT OF COLUMBIA, RESPONDENT.

FILED NOVEMBER 29, 1939

1 United States Court of Appeals for the District
of Columbia Filed Nov 29 1939 Joseph
W. Stewart, Clerk

In the United States Court of Appeals for the District of
Columbia

October Term, 1939

No. 7509

J. E. DYER & COMPANY, *Petitioner*,

vs.

DISTRICT OF COLUMBIA, *Respondent*.

Petition for review of decision of the Board of Tax Appeals
for the District of Columbia.

Stipulation of Facts

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel, that the following are the facts in the instant case:

During the month of July, 1938, petitioner filed its return of taxable personal property for the fiscal year ending June 30, 1939, reporting ownership, on July 1, 1938, of tangible personal property having a value of \$172,060.00. On or about September 1, 1938, the Assessor assessed a tangible personal property tax against petitioner in the amount of \$3,011.05, one-half of which was paid on September 21, 1938, and one-half on April 29, 1939. Thereafter, the Assessor increased the taxable value of the petitioner's average stock in trade by \$510.00 and the taxable value of petitioner's furniture and fixtures by \$1158.00, and on June 8, 1939, made an additional assessment against petitioner in the amount of \$29.22 on account of tangible personal property taxes for the fiscal year ending June 30, 1939. Said

2 additional tangible personal property taxes together with penalties for late payment were paid by the petitioner to the Collector of Taxes, D. C., on August 12, 1939.

On August 1, 1938, the petitioner filed a return with the Assessor, D. C., reporting its gross receipts from business in the District of Columbia during the calendar year 1937. On May 11, 1939, the Assessor assessed a business privilege tax against the petitioner for the fiscal year ending June 30, 1939, in the amount of \$4,817.55. Credit for tangible personal property taxes in the amount of \$1,505.52 (paid in September, 1938) was allowed against one-half of said business privilege taxes, and the remainder of the first installment of business privilege taxes, in the amount of \$923.25, was paid by the petitioner on May 23, 1939. The final installment of business privilege taxes, in the amount of \$2,408.77, was paid by the petitioner on June 2, 1939.

The original petition in this proceeding was filed with the Board of Tax Appeals for the District of Columbia on May 24, 1939, and an amended petition was filed on June 22, 1939. At the hearing before the Board of Tax Appeals on June 29, 1939, it was disclosed that the additional tangible personal property taxes in the amount of \$29.22 had not been paid, and objection was made to the jurisdiction of the Board to hear or determine any question raised by the petition until such tax was paid. It was agreed by counsel for the parties and the Board that the case should be heard at that time on condition that such tangible personal property taxes should be paid within the ninety-day period.

GLENN SIMMON,

*Assistant Corporation Counsel, D. C.
Counsel for the Respondent.*

FRANCIS J. KELLY,

Counsel for the Petitioner.

November 29, 1939

Approved

JO. V. MORGAN

Member Sole

*Board of Tax Appeals for the
District of Columbia*

FILED NOV 15 1939

United States Court of Appeals for the
District of Columbia

Joseph W. Stewart
CLERK

APRIL TERM, 1939

No. 7509.

J. E. DYER & COMPANY,
PETITIONER,

vs.

DISTRICT OF COLUMBIA,
RESPONDENT.

BRIEF FOR APPELLANT.

FRANCIS J. KELLY,
Counsel for Appellant,
Munsey Building,
Washington, D. C.

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United States Court of Appeals for the
District of Columbia

No. 7509.

J. E. DYER & COMPANY,
PETITIONER.

vs.

DISTRICT OF COLUMBIA,
RESPONDENT.

BRIEF FOR APPELLANT.

Title 6 of the District of Columbia Revenue Act for 1937, as amended, provides for the payment of a "Tax on the Privilege of Doing Business." Public Resolution #104 states "(b) Any tax on tangible personal property (other than motor vehicles) levied against and paid by the taxpayer to the District, *within the time prescribed by law for the payment of such tax by the taxpayer*, shall be allowed as a credit against the tax imposed by this title for the taxable year in which such tax on tangible personal property is paid."

The question in the instant case is the proper interpretation of the phrase "within the time prescribed by law." The Board of Tax Appeals of the District of Columbia has ruled in the *Smoot Sand & Gravel Corporation v. District of Columbia*, D. C. B. T. A., Docket No. 146, that the phrase means that the tax on tangible

personal property must be paid semiannually in September and March in accordance with Title 20 D. C. Code 1929, Sec. 758 in order for the credit to be permitted. Appellant contends, however, that even though the tax on tangible personal property be paid subsequent to the months of September and March that it should be permitted as a credit if paid prior to the payment of the Business Privilege Tax.

The facts in the instant case are closely analogous to the facts before the Board in the case of *The Smoot Sand & Gravel Corporation, supra*. There is, however, one distinction. In the *Smoot* case, petitioner failed to include in its return certain tangible personal property. In the instant case, petitioner included in its return all of its tangible personal property but evaluated certain portions of its stock in trade and furniture and fixtures at a value which the assessor subsequently determined to be too low. It must be conceded that petitioner in its evaluation acted in good faith and consequently no intent to evade the tax can be or is imputed to petitioner.

The question presented, therefore, may be briefly summarized as follows: Where a taxpayer, validly and in good faith, makes a return of its tangible personal property upon which a tax is assessed and paid and thereafter the assessor, determining that the evaluation of such taxpayer although in good faith is too low, revalues such property and assesses an additional tax which is paid, is the taxpayer entitled to a credit against its business privilege tax of only that portion

of the personal property tax paid by virtue of the first assessment or is it entitled to a credit for the entire personal property tax so paid?

Appellant respectfully submits that the entire amount of the personal property tax assessed against and paid by it should be allowed as a credit; that before a tax can become payable an assessment by the District is necessary; that until such assessment there can be no liability for payment of a tax and consequently no justification, in law or in fact, for the imposition of a penalty, the result attained in the instant case by depriving this taxpayer of a portion of the credit granted for personal property taxes paid against the tax imposed on the privilege of doing business.

With reference now to the question of whether or not assessment is necessary before the tax becomes payable, an examination of the authorities discloses the following definitions attributed to the word "assess":

Bouvier's Law Dictionary:

"To rate or fix the proportion which every person has to pay of any particular tax. To tax."

It also defines the word "assessment" as follows:

"Determining the value of a person's property or occupation for the purpose of levying a tax. Determining the share of a tax to be paid by each individual. Laying a tax."

In *Allen v. McKay*, 52 Pac. 828, 831, 120 Cal. 332, the court stated with respect to the word "assess" as follows:

“* * * In Abbott’s Law Dictionary the term is defined: To determine by rules of law a sum of money to be paid; to rate the proportional contribution due from another person to a fund; to fix the amount payable by a person, or each of several persons, in satisfaction of an established demand. In Anderson’s Law Dictionary it is defined: to rate or fix the proportion which each person is to pay of a tax; to tax; to adjust the shares of a contribution by several persons towards a common object, according to the benefit received; to fix the value or the amount of a thing; to determine by rules of law a sum to be paid; to rate the proportional contribution due to a fund.”

From the foregoing it is evident that an assessment precedes the tax. There is no tax until there has been an assessment. No tax can be payable until there has been an assessment. The fact that an assessment is a prerequisite to a tax liability is also clear from the following quotation taken from the opinion of the Supreme Court of the United States in the case of *Bull, Executor, v. United States*, 295 U. S. 247, 259:

“A tax is an extraction by the sovereign, and necessarily the sovereign has an enforceable claim against everyone within the taxable class for the amount lawfully due from him. The statute prescribes the rule of taxation. Some machinery must be provided for applying the rule to the facts in each taxpayer’s case, in order to ascertain the amount due. The chosen instrumentality for the purpose is an administrative agency whose action is called an assessment. The assessment may be a valuation of property subject to taxation which valuation is to be multiplied by the statutory rate to ascertain the amount of tax. Or it may include the calculation and fix the amount of tax payable, and assessments of federal estate and in-

come taxes are of this type. Once the tax is assessed the taxpayer will owe the sovereign the amount when the date fixed by law for payment arrives."

It is clear beyond doubt from the foregoing that the taxpayer owes the sovereign nothing until there has been an assessment and *that the date fixed by law for payment can not arrive until after the assessment is made.*

In the foregoing case the Supreme Court had under consideration the federal estate and income taxes. They are of a self-assessing character in that the rates are prescribed by the statute and the taxpayer fixes the valuations upon which those rates are applied. As that case, however, also clearly indicates, this is not the only method of assessment because it may involve a valuation of property and a fixing of the rate to be applied to such valuation by an administrative agency. The District of Columbia tangible personal property tax is of this character. The statute does not fix the rate of taxation for tangible personal property. The return, itself, so indicates because it states "Tangible property—rate supplied later," and no provision is made for the computation of tax on the return.

An examination of the laws of the District of Columbia discloses that Section 753 of Title 20 of the District Code sets forth the requirement relative to the filing of personal property tax returns. After setting forth these requirements, the statute then goes on to say:

“And thereupon said Board of Personal Tax Appraisers, or any one of the members thereof, shall assess said property at its fair cash value, and enter the same in the columns upon said blanks provided for that purpose, and the amount thus ascertained shall be entered upon the books for taxation for each fiscal year.”

That Section also provides that if the Board of Personal Tax Appraisers is not satisfied as to the correctness of the return said return may be rejected, and the Board, or any one of its members,

“may from the best information he or they can procure, or by making such examination of the personal property as may be practicable, assess the same in such amount as may to him or them seem just.”

Section 754 of Title 20 imposes the tax. It reads in part as follows:

*“On all tangible personal property, assessed at a fair cash value * * * there shall be paid to the Collector of Taxes of the District of Columbia the rate of tax fixed in accordance with Section 681 of this Title.”*

Nowhere else in the laws of the District of Columbia is a tax imposed upon personal property of the character here involved. It will be noted that it is imposed on tangible personal property assessed at a fair cash value. From the quotations above from Section 753, it is evident that it is the duty of the Board of Personal Tax Appraisers to make such assessment. A taxpayer may be called upon to give his opinion of the fair cash value but the duty of fixing and assessing at a fair cash value is imposed upon the Board of Personal Tax Appraisers.

Section 681, above referred to, prescribes the method of arriving at a rate of taxation. An examination of that Section discloses that there are a number of factors to be taken into consideration in arriving at the rate. There must be a knowledge of the other taxes and revenues of the District of Columbia; the amount of money appropriated by Congress to be paid by the District of Columbia; the valuation of the property, both real and personal, which is subject to taxation, and the rate of tax to be applied to intangible personal property as well as the valuation thereof. It is obvious, therefore, that no assessment can be made until the District of Columbia has determined the value of real and personal property subject to taxation.

An examination of the other sections of the laws of the District of Columbia relating to taxation indicates a similar conclusion. For example, the section of the law fixing the statute of limitations for the assessment and collection of the taxes indicates that an assessment is necessary in order to levy a distraint or to collect a tax. Likewise that section of the law giving this Board jurisdiction in tax cases grounds it upon an assessment by the District and then proceeds to provide that the tax must be paid, but it is clear that this Board would not have jurisdiction in case of the payment of a tax if there had been no assessment. Likewise from the foregoing it would seem perfectly obvious that no individual taxpayer could make a self-assessment of a tangible personal property tax, first, because the determination of the fair cash value rests with the taxing authorities and second, because the de-

termination of the rate of taxation likewise rests with the taxing authorities.

The fact that a valid assessment is a prerequisite to tax liability is also evident from the case of *Tumulty, et al. v. District of Columbia*, 67 W. L. R. 142, decided on January 16, 1939. That case involved a tax liability for years prior to the enactment of the District of Columbia Revenue Act of 1937 and consequently a different statutory period of limitations was involved. Nevertheless that case is authority for the fact that there is no tax liability to the District of Columbia unless there is a valid assessment. In that case the Court of Appeals for the District of Columbia said at page 145:

"The statute * * * put the active duty upon the taxing authorities to see that the property is assessed properly. It is a rule without exception that if a property tax assessment is not properly made there is no proper basis for a tax, and a tax attempted to be collected is void."

If a tax is void because a tax assessment is not properly made then certainly it is void if there is no assessment at all. In that case the court also said:

"There was not a valid assessment against the company upon which the tax liability rests."

And again the court said:

"It is fundamental to tax validity that there be a valid assessment."

Finally, the court stated at page 148:

"A tax to be valid depends upon a particular statute creating liability and upon the proper procedural steps being taken by the taxing authorities.

It is fundamental that an assessment must be validly made before the tax liability can possibly accrue to the taxpayer."

The *Tumulty* case, *supra*, is certainly authority for the fact that the mere ownership of the property does not create tax liability. Tax liability is created only if the taxing authorities take the procedural steps required by law and make a valid assessment. It is not here questioned that the District authorities made a valid assessment against the petitioner, but it is respectfully contended that until that assessment was validly made there was no tax liability. If the necessary procedural steps had not been taken any attempt to collect such additional taxes would have been void. Therefore, as the assessment is necessary to create the tax liability, it certainly cannot be contended that the tax was payable before the date when it first effectually became a liability.

With reference now to the opinion rendered in the *Smoot* case, *supra*, the Board, in considering the proposition of petitioner that "it was not required by law to pay the tax before the date of assessment," stated:

"In a sense the petitioner is correct. * * * The Board, however, does not believe that agreement with the claim of the petitioner would carry out the intention of Congress in enacting Public Resolution 104."

This statement, it is believed, is the crux of the entire case, and it is this assertion of the Board with which petitioner respectfully disagrees.

The Board amplifies its general statement quoted, *supra*, by asserting further that:

“The manifest purpose of Section 7(b), as amended by Public Resolution 104, 75th Congress, is to encourage or force the prompt payment of personal property taxes * * *.”

With this reasoning, appellant is not in accord. It is submitted that the manifest and certainly the primary purpose of Section 7(b) was to allow as a credit against the business privilege tax, the tax already paid on personal property.

That this reasoning is correct is borne out by the wording of the Section in question as it was first incorporated in the Act. The Section reads as follows:

“Sec. 6. * * * Any tax levied by the District of Columbia upon tangible personal property * * * for the fiscal year 1937-1938 and paid by such taxpayer shall be credited upon the tax due under this title. * * *”

Nowhere in the above language can there be found an intention, manifest or otherwise, to grant such credit merely to “encourage or force the prompt payment of personal property taxes,” as the Board asserts. It is submitted that the change in the language by amendment was merely administrative and in no wise changed the original intent of Congress in the enactment of the section in question.

An analysis of the result that would be obtained if the Board is correct in its interpretation will, it is

submitted, show conclusively that such interpretation is erroneous and clearly without the scope of the purpose and intent of Congress.

An examination of Title 20, D. C. Code 1929, Sec. 758, dealing with personal property taxes, discloses, *inter alia*, that:

“* * * personal taxes * * * shall * * * be payable semi-annually in equal installments in the months of September and March. If either of said installments on * * * personal property shall not be paid within the months when the same is due, said installments shall thereupon be in arrears and delinquent, and there shall be added and collected with said tax a penalty of 1 per centum per month upon the amount thereof for the period of such delinquency, and such installment or installments, with the penalties thereon, shall constitute a delinquent tax to be collected in the manner now provided by law.”

Congress has thus provided for the prompt payment of the personal property taxes by imposing a penalty of one per cent a month for failure so to do. *It is submitted that this is the only penalty contemplated or intended by Congress and the action of the Board in depriving a taxpayer of the credit allowed by Section 7(b) results in effect in a further and additional penalty being imposed, a result exactly contrary to the law thereon.* As was stated by the Supreme Court in *Elliott v. Railroad Company*, (1878) 99 U. S. 576 (at page 576):

“Penalties are never extended by implication. They must be expressly imposed or they cannot be enforced.”

In the instant case it is the position of petitioner that under the facts and circumstances a valid assessment is a prerequisite to tax liability (*Tumulty, et al. v. District of Columbia, supra*); that until such assessment is made there is no tax liability and consequently no justification for the imposition of a penalty. The Board's strict and literal interpretation can only result in the supposition that Congress has attributed to all taxpayers a divine infallibility in evaluating their property subject to tax which would permit of no error. Such an interpretation closes the door to any taxpayer who, acting in good faith, has placed a value on property with which value the assessor disagrees, and subjects him, no matter what the cause, to a penalty for such time, no matter to what extent, that is taken by the assessor in arriving at what he deems is the correct evaluation and the correct tax.

However, assuming, *arguendo*, that the above argument is fallacious in its entirety, and that this taxpayer is rightly liable for the penalty imposed under Section 758 of the D. C. Code, nevertheless, it is submitted that by no stretch of the imagination can it be assumed that Congress intended that a further and additional penalty be imposed by depriving a taxpayer of the credit granted for personal property taxes paid against the tax imposed on the privilege of doing business. Nothing in the statute, either expressly or impliedly, indicates that such was Congress' intent. Appellant reiterates that the primary purpose and intent of Congress was to permit a credit for personal property taxes paid within the year. "*A thing which is within the inten-*

tion of the makers of the statute is as much within the statute as if it were within the letter." *United States v. Freeman*, (1845) 3 How. (U. S.) 55. See also *Holy Trinity Church v. United States*, (1892) 143 U. S. 457. All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. *The reason of the law in such cases should prevail over its letter.* *United States v. Tirby*, (1868) 7 Wall. (U. S. 482, 486, 487.

In *Knowlton v. Moore*, (1900) 178 U. S. 41, a case which involved the construction of a Federal tax on legacies, the Supreme Court said (at page 77):

"We are, therefore, bound to give heed to the rules, that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute."

Finally, in *Farmers Loan & Trust Co., Executors, v. Minnesota*, (1930) 280 U. S. 204, the Supreme Court said (at page 202):

"Taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences."

Appellant therefore respectfully requests that this Court find (1) that the Personal Property tax is paid

“within the time prescribed by law” if paid within a reasonable time after assessment, (2) that a tax is not due in March or September if it is assessed subsequent to those months, (3) even though a tax is assessed prior to March or September and paid after those months that it is paid “within the time prescribed by law” if paid prior to the payment of the Business Privilege Tax, and (4) that when the Personal Property Tax is paid *with the penalty added for late payment* that the taxpayer has performed his penance and should receive the Collector’s absolution, and the Collector’s refusal to permit the tangible personal property tax already paid as a deduction from the Business Privilege Tax is in effect a double penalty.

For these reasons appellant prays that the opinion of the District of Columbia Board of Tax Appeals be reversed.

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UNITED STATES
COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED DEC 28 1939

Joseph W. Stewart

CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1939

No. 7509

J. E. DYER & COMPANY,

Petitioner,

vs.

DISTRICT OF COLUMBIA,

Respondent.

BRIEF ON BEHALF OF RESPONDENT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1939

No. 7509

J. E. DYER & COMPANY,

Petitioner.

vs.

DISTRICT OF COLUMBIA.

Respondent.

BRIEF ON BEHALF OF RESPONDENT
STATEMENT OF THE CASE

This is an appeal under Title IX of the District of Columbia Revenue Act of 1937, as amended by the Act approved May 16, 1938, 52 Stat. 371 (Section 975, Title 20, D. C. Code 1929, Supplement IV) from a decision of the Board of Tax Appeals for the District of Columbia.

In the month of July, 1938, petitioner filed its return of taxable personal property for the fiscal year ended June 30, 1939, reporting ownership, on July 1, 1938, of tangible personal property having a value of \$172,060.00. On or about September 1, 1938, the Assessor assessed a tangible personal property tax against petitioner in the amount of \$3,011.05, one-half of which was paid on September 21, 1938, and one-

half on April 29, 1939. Thereafter, the Assessor increased the taxable value of the petitioner's average stock in trade by \$510.00 and the taxable value of petitioner's furniture and fixtures by \$1.158.00, and on June 8, 1939, made an additional assessment against petitioner in the amount of \$29.22 on account of tangible personal property taxes for the fiscal year ended June 30, 1939. Said additional tangible personal property taxes together with penalties for late payment were paid by the petitioner to the Collector of Taxes, D. C., on August 12, 1939. (Addition to Record by Stipulation, p. 2.)

On August 1, 1938, the petitioner filed a return with the Assessor, D. C., reporting its gross receipts from business in the District of Columbia during the calendar year 1937. On May 11, 1939, the Assessor assessed a business privilege tax against the petitioner for the fiscal year ended June 30, 1939, in the amount of \$4,817.55. Credit for tangible personal property taxes in the amount of \$1,505.52 (paid in September, 1938) was allowed against one-half of said business privilege taxes, and the remainder of the first installment of business privilege taxes, in the amount of \$923.25, was paid by the petitioner on May 23, 1939. The final installment of business privilege taxes, in the amount of \$2,408.77, was paid by the petitioner on June 2, 1939. (Addition to Record by Stipulation, p. 3.)

The original petition in this proceeding was filed with the Board of Tax Appeals for the District of Columbia on May 24, 1939, and an amended petition was filed on June 22, 1939. At the hearing before the Board of Tax Appeals on June 29, 1939, it was disclosed that the additional tangible personal property taxes in the amount of \$29.22 had not been paid, and objection was made to the jurisdiction of the Board to hear or determine any question raised by the petition until such tax was paid. It was agreed by counsel for the parties and the Board that the case should be heard at that time on condition that such tangible personal property taxes should be paid within the period of ninety days from the date of as-

assessment of business privilege taxes. (Addition to Record by Stipulation, p. 3.)

SUMMARY OF ARGUMENT

The taxes here in question were not paid under protest in writing and the Board of Tax Appeals for the District of Columbia was therefore without jurisdiction to hear or determine any question presented in the petition filed in this proceeding.

The tangible personal property taxes here in question were not paid within the time prescribed by law for the payment of such taxes.

The credit here claimed by petitioner is not within the intention of the statute and is specifically prohibited by the regulations.

Right to deductions must clearly appear.

ARGUMENT

The petitioner here is aggrieved by an assessment of business privilege taxes for the fiscal year ended June 30, 1939, made on May 11, 1939, and paid by the petitioner to the Collector of Taxes, D. C., on May 23, 1939, and June 2, 1939. Petitioner claims that such assessment is too high for the reason that the Assessor, D. C., failed to allow as a credit against such business privilege taxes the sum of \$29.22 representing tangible personal property taxes assessed against the petitioner on June 8, 1939, and paid by the petitioner to the Collector of Taxes, D. C., on August 12, 1939.

No question is raised in this appeal regarding the validity of any assessment of taxes against the petitioner. Petitioner concedes that the assessments were valid (see Petitioner's Brief, p. 9) but argues that the tangible personal property taxes should be allowed as a credit against the business privilege taxes theretofore paid for the reason that such tangible personal property taxes were paid "within the time prescribed by law" as contemplated by Section 7(b) of Title VI of the District of Columbia Revenue Act of 1937, as amended, 52

Stat. 624 (Section 970f. (b), Title 20, D. C. Code 1929, Supplement IV), *infra*.

I

The Board of Tax Appeals was without jurisdiction to hear or determine any question presented in the petition filed in this proceeding.

The jurisdiction of the Board of Tax Appeals is defined by Section 3 of Title IX of the District of Columbia Revenue Act of 1937, as amended by the Act approved May 16, 1938, 52 Stat. 371 (Section 974, Title 20, D. C. Code 1929, Supplement IV), which provides as follows:

"Any person aggrieved by any assessment by the District against him of any personal property, inheritance, estate, business privilege, gross receipt, gross earnings, or insurance premiums tax or taxes, or penalties thereon, may, within ninety days after notice of such assessment, appeal from such assessment to the Board, provided such person shall first pay such tax, together with penalties and interest due thereon, to the collector of taxes of the District of Columbia under protest in writing. The mailing to the taxpayer of a statement of taxes due shall be considered notice of assessment with respect of such taxes. The Board shall hear and determine all questions arising on said appeal and shall make separate findings of fact and conclusions of law, and shall render his decision thereon in writing. The Board may affirm, cancel, reduce, or increase such assessment."

The record clearly discloses that neither the business privilege taxes nor the personal property taxes here in question were paid to the Collector of Taxes, D. C., under protest in writing.

The jurisdiction of the Board of Tax Appeals for the District of Columbia, like the United States Board of Tax Appeals, is conferred and limited by statute and its powers and duties are strictly confined to those prescribed in the statute.

Tyson v. Comr. (CCA-7, 1933), 66 F. (2d) 160;

Clois L. Greene, 2 B.T.A. 148;

Hamel, Practice and Evidence Before the United States Board of Tax Appeals, Chapter 2, Section 17;

To the same effect, among many cases, see:

Southern California Loan Assn., 4 B.T.A. 223;

William C. Shanley, Jr., et al., Exrs., 7 B.T.A. 521, aff. in 28 F. (2d) 1018.

There are no presumptions in aid of the jurisdiction of the Board such as may exist with respect to courts of general jurisdiction. In *Southern California Loan Assn.*, *supra*, it was said (p. 224): "The Board might go even further and hold that, since the Board is a tribunal of limited jurisdiction, the presumption, in every stage of the cause, is that the complaint is without its jurisdiction unless the contrary appears from the record."

See also:

Fred Shingle, 34 B.T.A. 875, holding that the petitioner before the Board has the burden of establishing the jurisdiction of the Board;

Estate of S. S. Hunter, Inc., 26 B.T.A. 259, holding that "In proceedings before the Board the presumption is always against jurisdiction, and it is the duty of the party averring jurisdiction to affirmatively establish it."

William C. Shanley, Jr., et al., Exrs., *supra*;

First Bond and Mortgage Co., 21 B.T.A. 1;

Louisiana Naval Stores, Inc., 18 B.T.A. 533;

A. H. Strange, 1 B.T.A. 810;

Frost Superior Fence Co., 1 B.T.A. 1096;

Hamel, Practice and Evidence Before the United States Board of Tax Appeals, Chapter 2, Section 58.

Petitioner here has failed to prove one of the essential jurisdictional facts. The statute confers jurisdiction upon the Board of Tax Appeals only in cases where the tax has been paid *under protest in writing*; the taxpayer may avail him-

self of this statutory remedy only by complying with the plain provisions of the statute.

No evidence was adduced at the hearing before the Board. It was, however, pointed out to the Board that the personal property taxes for which petitioner was claiming credit had not then been paid. It was agreed that argument should be heard at that time on condition that such personal property taxes would be paid within the period of ninety days from the date of the assessment of business privilege taxes (i.e., May 11, 1939). Such taxes were paid on August 12, 1939, which date is not within ninety days from the date of assessment of such business privilege taxes.

It seems clear that payment of the tangible personal property tax is a condition precedent to the right to claim the amount of such taxes as a credit against business privilege taxes. It seems equally clear that payment of such personal property taxes within the ninety-day period after the date of assessment of business privilege taxes is a condition precedent to jurisdiction of the Board of Tax Appeals.

Objection was made, at the time of hearing, to the jurisdiction of the Board for the reason that the personal property taxes had not then been paid. Since no evidence was adduced at the hearing and the decision of the Board of Tax Appeals was rendered before payment of the personal property taxes, no objection was made to the petitioner's failure to make the payments in question under protest in writing and to the failure to make payment of the personal property taxes within ninety days from the date of assessment of the business privilege taxes. However, where the lack of jurisdiction is apparent on the face of the record, it will be observed by the appellate court, whether or not set up or relied on as a defense below. See *Lewis-Hall Iron Works v. Blair*, 23 F. (2d) 972, 57 App. D. C. 364, certiorari denied 277 U.S. 592.

II

The tangible personal property taxes here in question were not paid within the time prescribed by law for the payment of such taxes.

Section 7(b), Title VI, of the District of Columbia Revenue Act of 1937, as amended, 52 Stat. 624 (Section 970f. (b), Title 20, D. C. Code 1929, Supplement IV), provides as follows:

"Any tax on tangible personal property (other than motor vehicles) levied against and paid by the taxpayer to the District, within the time prescribed by law for the payment of such tax by the taxpayer, shall be allowed as a credit against the tax imposed by this title for the taxable year in which such tax on tangible personal property is paid."

The only provision in any law prescribing the time for payment of personal property taxes to the District of Columbia is that contained in Section 758, Title 20, D. C. Code 1929, which reads as follows:

"Real estate taxes and personal taxes of all kinds, excepting the tax on motor vehicles as herein provided, shall hereafter be payable semiannually in equal installments in the months of September and March. If either of said installments on real or personal property shall not be paid within the months when the same is due, said installments shall thereupon be in arrears and delinquent, and there shall be added and collected with said tax a penalty of 1 per centum per month upon the amount thereof for the period of such delinquency, and such installment or installments, with the penalties thereon, shall constitute a delinquent tax to be collected in the manner now provided by law."

Petitioner contends (1) that the personal property tax was paid "within the time prescribed by law" if paid within a

reasonable time after assessment, (2) that a tax is not due in March or September if it is assessed subsequent to those months, and (3) even though a tax is assessed prior to March or September and paid after those months, it is paid "within the time prescribed by law" if paid prior to the payment of the business privilege tax (Petitioner's Brief, pp. 13 and 14). Petitioner's argument would allow the credit only in cases where the personal property tax has been paid within a reasonable time after assessment and prior to the payment of business privilege taxes. Petitioner's argument would deny the credit claimed in the instant case because such taxes were not paid prior to payment of the business privilege taxes nor within a reasonable time after assessment. Assuming, without admitting, that no liability accrues until an assessment has been made, payment within a reasonable time after such assessment is not "within the time prescribed by law." The clause "within the time prescribed by law," as used in Section 7(b), refers to statute law only. *District of Columbia v. Georgetown & T. Ry. Co.*, 41 F. (2d) 424, 59 App. D.C. 335. The only time "prescribed by law" for the payment of personal property taxes is the months of September and March of the fiscal year in which such taxes are due.

It may be argued that the assessment of personal property taxes should have been made in sufficient time to allow petitioner to make payment thereof in March, 1939, and thereby be entitled to the credit, but such argument would not aid the petitioner here even if he had made payment of the personal property taxes in question within a reasonable time after assessment. Congress has provided that those taxpayers who pay tangible personal property taxes within the time which Congress had already prescribed for the payment of such taxes may be allowed to credit the amount of such taxes upon business privilege taxes due for the same fiscal year. The right to such credit depends upon legislative grace and may be allowed to whatever extent and upon whatever conditions the legislature chooses to specify.

III

The credit here claimed by petitioner is not within the intention of the statute and is specifically prohibited by the regulations.

The statute contemplated the allowance of credit against business privilege taxes for the fiscal year ended June 30, 1939, of only those tangible personal property taxes which were paid to the Collector of Taxes, D. C., within the time prescribed by law (i. e., September, 1938, and March, 1939) and within the taxable year for which the credit is claimed. Petitioner here did not pay such taxes within the time prescribed by law; nor did petitioner pay such taxes within the fiscal year for which the credit is claimed.

In Section 4 of Title VII of the District of Columbia Revenue Act of 1937, as amended by Section 7 of the Act approved May 16, 1938, 52 Stat. 370, (Section 971(b), Title 20, D. C. Code 1929, Supplement IV) the Commissioners of the District of Columbia are authorized to make such rules and regulations as may be necessary to carry out the provisions of the Act. On June 10, 1938, the Commissioners promulgated regulations for the administration and enforcement of Title VI, as amended, Section 19 of which reads as follows:

"Any tax on tangible personal property (other than motor vehicles) for the fiscal year 1938-1939, levied against and paid by the taxpayer to the District within the time prescribed by law for the payment of such tax by the taxpayer, shall be allowed as a credit against the tax imposed by the Title. No such credit shall be allowed unless the tangible personal property tax shall be paid within the time prescribed by law (semi-annual installments during the months of September and March) and before the payment of the tax required to be paid under the provisions of this Title (see Appendix B)."

Where an ordinance or regulation is passed by virtue of express power, not inconsistent with the Constitution or treaties

or laws of the United States, and such power has been substantially followed and exercised in a reasonable manner, the ordinance or regulation will be sustained, regardless of the opinion of the court respecting its reasonableness.

McQuillin Municipal Corporations, Second Edition, Vol. 2, Section 760, page 713;

19 *R.C.L.* Section 112, page 805.

A municipal ordinance or regulation will be presumed to be reasonable unless the contrary appears on its face or is established by evidence.

McQuillin Municipal Corporations, *supra*, pages 737-738;

19 *R.C.L.* Section 113, pages 808-809;

Western Union Telegraph Co. v. New Hope, 187 U.S. 419;

Laurel Hill Cemetery v. San Francisco, 216 U.S. 358;

Pacific States Co. v. White, 296 U.S. 176, 185-186.

In the case of *Montz v. District of Columbia*, 20 App. D.C. 568, 572, this Court said:

“* * when * * Congress, within the scope of its legitimate authority, empowers the Commissioners to enact such regulation, it should be made very clear by him who would avoid the effect of it, that the action of the municipal authorities is harsh and oppressive, or in some way tends to work injustice.”

In the absence of any proof to the contrary, Section 19 of the Regulations must be held to be valid and the provisions thereof have the force and effect of law.

IV

Right to deductions must clearly appear.

Petitioner seeks a credit against business privilege taxes due for the fiscal year ended June 30, 1939. Credits are, in effect, exemptions, and the right thereto must be determined by the same strict rules that govern the right to exemption from taxation. Whether and to what extent deductions or credits shall

be allowed depends upon legislative grace; and only if there is clear provision therefor can any particular deduction or credit be allowed. The taxpayer must be able to point to a specific provision of the statute permitting the deduction or credit, and must bring himself within its terms.

New Colonial Co. v. Helvering, 292 U.S. 435, 440;

Brown v. Helvering, 291 U.S. 193, 199, 205;

Burnet v. Houston, 283 U.S. 223, 227;

Woolford Realty Co. v. Rose, 286 U.S. 319, 326;

Ilfeld Co. v. Hernandez, 292 U.S. 62, 66;

Helvering v. Ins. Co., 294 U.S. 686, 689, 690.

CONCLUSION

For the reasons above stated, it is respectfully submitted that

(1) The Board of Tax Appeals was without jurisdiction to hear or determine any question presented in the petition filed in this proceeding, and

(2) In any event, the petitioner is entitled to no credit against business privilege taxes paid the District of Columbia for the fiscal year ended June 30, 1939, for tangible personal property taxes paid on August 12, 1939.

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